

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MALIBU MEDIA, LLC,

Plaintiff,

v.

JOHN DOE, infringer using
IP address 70.121.72.191,

Defendant.

Docket No. 5:19-cv-00834-DAE

San Antonio, Texas
February 23, 2021

TRANSCRIPT OF MOTION HEARING (BY VIDEO)
BEFORE THE HONORABLE RICHARD B. FARRER
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF:

Paul Stephen Beik
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8100 Washington Avenue, Suite 1000
Houston, TX 77007

FOR THE DEFENDANT:

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COURT RECORDER: FTR Gold

Proceedings reported by electronic sound recording. Transcript
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1 (2:34 p.m.)

2 THE COURT: Next up before the Court is case number
3 SA:19-CV-00834-DAE, Malibu Media, LLC, versus John Doe. Let's
4 see.

5 Counsel, would you please introduce yourselves.

6 MR. MORRIS: JT Morris on behalf of defendant John
7 Doe.

8 MR. BEIK: Paul Beik on behalf of plaintiff Malibu
9 Media, LLC.

10 THE COURT: Okay. All right. We're here in
11 connection with a motion requesting sanctions that's filed by
12 defendant John Doe. I'll just refer to John Doe as "Mr. Doe"
13 or "defendant" just for ease of -- or convenience in terms of
14 talking about -- talking about the defendant. Obviously, I
15 don't know anything about the identity of defendant any more
16 than anybody would from reading the papers, where it's kept
17 pretty scrubbed clean.

18 So, Mr. Morris, why don't you just start us off here and
19 just outline for me why we're here today and just a brief
20 background on how we got here. And in particular, you know, we
21 had you all set up with respect to a motion to compel, and then
22 there was an advisory that was filed. That seemed to alleviate
23 the need to have a hearing on that motion, and we didn't need
24 to take it up.

25 But now it seems like some of those issues have come back.

1 So maybe we need to just sort of back up and talk about that a
2 bit, too. So why don't you go ahead.

3 MR. MORRIS: Thank you, Your Honor.

4 And as you say, we're here on Doe's motion for sanctions,
5 something we don't file lightly, but we felt that essentially
6 we had no other option.

7 John Doe, the defendant here, was sued by Malibu Media for
8 copyright infringement over BitTorrent. And in response, he
9 filed affirmative defenses and counterclaims, including a
10 counterclaim for abuse of process, in which he alleges that
11 Malibu sued him and has been suing others for a long time on
12 methods it knows is faulty, essentially to extract settlement
13 payments from anonymous defendants because they're being sued
14 for infringing pornographic films.

15 And part of those allegations center in large part on
16 Malibu's relationship with IPP, its German consultant and had a
17 relationship with for eight years, from which it obtained all
18 of its information, its infringement evidence and from which it
19 obtained affidavits to use to ask courts, including this one,
20 to subpoena defendants' internet service providers so they can
21 unmask those defendants.

22 So, in effect, the methods IPP uses, its relationship with
23 Malibu, what Malibu knows about IPP's methods, all of those
24 things are going to be embodied in communications between
25 Malibu and IPP and about IPP.

1 Now, this isn't -- again, this isn't a situation where it's
2 a one-off consultant Malibu has used. Malibu has an eight-year
3 relationship with IPP. At the very least, as Malibu's
4 representative even admitted in their declaration in opposition
5 here, they expected IPP to send them evidence and send them
6 affidavits from Germany. So in this day and age, one would
7 expect that those would be in emails or some other sort of
8 written communication. We haven't received any of those except
9 for one single email.

10 So from those perspective -- and, again, we asked for those
11 in the motion to compel. Malibu represented in a joint
12 advisory they would send all communications about IPP. We got
13 one.

14 Now, in Ms. Pelissier's deposition, who was Malibu's
15 corporate representative, she testified she's been -- she's
16 been trying to communicate with IPP recently, that IPP sent her
17 a series of communications seven months before her deposition.
18 And so they've been recently communicating with IPP. There's
19 evidence of that. And we don't have any of those logs, the
20 text messages between Ms. Pelissier and her employees about
21 IPP, none of that.

22 So when Malibu represented in its -- in the joint advisory
23 that we'd get those communications, we waited, and we asked and
24 we asked and we asked again, and we didn't get them. And
25 that's why we're here today, Your Honor.

1 And the bigger reason we're here today, obviously, is
2 because it prejudices Doe's ability to develop the affirmative
3 defenses and really his abuse of process counterclaim. We just
4 don't see a justification for Malibu for why they haven't
5 produced those. Really, you have this eight-year relationship,
6 and there's one single email. That just defies reason.

7 So from Doe's perspective, it's one of two things. It's
8 either that Malibu's obscuring those emails and other
9 communications or they spoliated them. Either way, that's
10 sanctionable behavior. And that's really why we're here today,
11 Your Honor.

12 THE COURT: Okay. So what specifically do you know
13 that there must be but that hasn't been produced?

14 MR. MORRIS: So, for example, the one email we have is
15 a email from IPP to Malibu's former general counsel
16 transmitting some data packet. We don't even have the
17 underlying data packet, which is another issue. We haven't
18 seen any more of those.

19 And the issue here I think that -- from Malibu's
20 perspective, it thinks it only had to produce any email from or
21 to IPP about this case. But that ignores the scope of the
22 abuse of process counterclaim, which is looking at IPP's
23 methods in general, both in this case and the thousands of
24 others they've helped Malibu file. Those are the emails we're
25 looking for, the emails they transmitted affidavits in, the

1 data packets, the actual attached data files that IPP's
2 sending.

3 We know -- so we can't assess what actually IPP is sending
4 Malibu and whether Malibu knows whether or not the information
5 IPP is sending is something they can legitimately file a
6 copyright infringement claim on. That's the core of the abuse
7 of process counterclaim.

8 THE COURT: Got it. Okay. Is there -- is there --

9 MR. MORRIS: And I'll add to that as well, Your Honor.
10 And, again, going back to Ms. Pelissier's deposition, logs of
11 Skype and WhatsApp chats, calls with IPP. She testified also
12 she had texted with a Malibu representative about IPP and
13 getting documents for this case. We don't have those texts
14 either. Those came after this lawsuit was filed. From our
15 perspective, IPP -- I mean, Malibu had an obligation to
16 preserve those. They didn't do it, because they haven't
17 produced them to us.

18 THE COURT: Okay. So certain texts. And then logs
19 of -- so what is this? This is underlying data from these
20 applications that records that there was a video or a -- let's
21 call it a telephone. You know what I mean. An audio
22 conversation. Because over WhatsApp and Skype, right, a lot of
23 people, especially internationally, use those in lieu of a
24 telephone.

25 And is a transcript made or generated? Is the call

1 recorded, or what is it that you're asking for?

2 And I think maybe at the core here, so maybe you can
3 address this, too, in answering this question, is the -- you
4 know, the agreement or the stipulation in the advisory doesn't
5 seem to be as precise as you're describing it to me now. And
6 so, you know, if it turns out that the Court needs to take a
7 charitable view of this, maybe it's just in that there wasn't
8 adequate communication between counsel about what it is that
9 was being agreed to in that advisory in terms of what was going
10 to be handed over.

11 So just explain to me why it is that the things that you're
12 saying should have been included are things that were agreed to
13 be handed over in that advisory.

14 MR. MORRIS: Sure. And I'll start with the first
15 question, Your Honor.

16 THE COURT: Okay.

17 MR. MORRIS: Our understanding is, at least when I use
18 WhatsApp on my phone, I get a log of who I called, when I
19 called them and, you know, whether it was text, chat --

20 THE COURT: [Inaudible] communication; right? That's
21 a log of a communication; right?

22 MR. MORRIS: It's still -- it's still an evidence of a
23 communication. From our perspective, it is -- it's evidence of
24 that communication. It's discoverable information about the
25 communication. Even if -- and even if it wasn't in that joint

1 advisory, Malibu, at least the way our request for productions
2 are structured, had an obligation to retain those and preserve
3 them.

4 And going to the emails I'm talking about, when IPP is
5 transmitting these affidavits, transmitting these data packets,
6 transmitting the underlying data, which we still don't have, I
7 think the fact that their representation in the joint advisory
8 was broad shows why sanctions are warranted here. They didn't
9 say -- they didn't say, "We're just going to -- we're going to
10 produce documents about IPP related to this case alone." They
11 said "all documents."

12 And they knew, from our request for production, we're
13 asking communications about the methods they used to identify
14 infringers using IP addresses, their relationship with IPP and
15 their other consultants they have used. So the RFPs encompass
16 those. And so I don't think their broad representation should
17 be viewed charitably here. In fact, it should be viewed the
18 opposite way.

19 THE COURT: Okay. And so when -- let me just look at
20 timing here. Scheduling order. So you had dispositive motions
21 due back in December; is that right?

22 MR. MORRIS: That's correct, Your Honor.

23 THE COURT: And so then you sort of have -- and so
24 discovery closed when?

25 MR. MORRIS: I believe October 20th was the last day.

1 THE COURT: Okay. And so you don't want the
2 information now. You want the sanctions; is that right?

3 MR. MORRIS: We want the information. If you look at
4 Exhibit B to our motion for sanctions, there's an email chain
5 in there, where we're constantly needling Malibu, "Where's the
6 communications? Where's this other information we asked for?"
7 understanding that -- you know, that the discovery obligation
8 extends beyond the date. You still have to produce information
9 that comes into your possession, custody or control.

10 That's why I'm saying, we did not file this motion for
11 sanctions lightly. We wanted the communications. But we
12 haven't gotten them. So at this point that's why we're filing
13 this motion for sanctions where we're asking for an adverse
14 jury instruction because there's no other recourse for Doe
15 here.

16 THE COURT: When was the advisory filed?

17 MR. MORRIS: Your Honor, the advisory was filed on
18 August 7th, 2020.

19 THE COURT: Okay. So a couple of months before the
20 close of discovery and sort of hoping that between then and the
21 close of discovery something -- you'd get all the stuff that
22 you were looking for?

23 MR. MORRIS: That's correct. And this was also under
24 our understanding of Malibu's representation that all of its
25 files were in the possession of its former general counsel who

1 it was in a lawsuit with and that it was working out
2 negotiations to get all those files back. So we were just
3 taking Malibu at their word that they had -- they were still
4 working to get all the documents about IPP from its former
5 general counsel.

6 THE COURT: Okay. And when did you depose her?

7 MR. MORRIS: October 20th, the final day of discovery.

8 THE COURT: Okay. And then you asked to extend
9 deadlines -- gosh. I just had it, and now I lost it. Here we
10 are. Okay. Joint motion to extend scheduling order deadlines
11 on the 20th of November. So that's after discovery's closed.
12 And you're probably asking there to -- what? Extend
13 dispositive motion deadlines?

14 MR. MORRIS: We extended dispositive motion. If Your
15 Honor recalls, we had a hearing on Malibu's motion to extend
16 all discovery, which the Court denied. But during that
17 hearing, Doe made the representation that it would offer Doe's
18 deposition as a good faith gesture. So we extended -- we asked
19 to extend dispositive motion deadlines so Malibu could depose
20 my client and have enough time to prepare summary judgment
21 papers.

22 THE COURT: Okay. But we didn't have another motion
23 to compel filed. When did we -- you were just saying when you
24 had a hearing before me. When was that, again, that last one?

25 MR. MORRIS: Your Honor, I don't recall directly. I

1 believe Mr. Beik might know better than me. I think it was in
2 early October.

3 THE COURT: Yeah. Let's take a look. We'll figure it
4 out. I just --

5 MR. MORRIS: November 16th, Your Honor.

6 THE COURT: November 16th. Yep. Right. Courtroom
7 deputy beat you to it.

8 Okay. So -- and your motion to extend -- actually, it
9 wasn't yours. It was Malibu's. But I'm just looking at it
10 here on my screen. If it looks like I'm staring blankly at
11 you, I'm just reading something. Just bear with me.

12 Okay. So plaintiff wanted an extra 120 days to take up
13 what it was going to do about counterclaims. And you all
14 opposed that; right, Mr. Morris?

15 MR. MORRIS: We did.

16 THE COURT: Just here -- just reorienting myself here.
17 Bear with me. Okay. All right. I think I'm back in. I
18 understand the timing now.

19 Is it -- is it too late to get this information now? I
20 guess -- I'm going to hear from Malibu's counsel in a second,
21 and I suspect he might say that, "Well, there's just nothing
22 to -- you know, there's nothing to produce. We've given
23 everything we have." But if there were to be more information
24 found, is that helpful at any -- at all at this point?

25 MR. MORRIS: I certainly think it's helpful, Your

1 Honor. As we've said, these emails were read from other --
2 where IPP's transmitting affidavits, underlying infringement
3 data in those attachments, they would be very helpful to the
4 abuse of process claim. But what looks -- I think sanctions
5 are still in order to compensate Doe for having to bring this
6 motion and a motion to compel. But if Malibu can produce that
7 information, absolutely, it'd be helpful.

8 THE COURT: Okay. Well, let me hear from Malibu and
9 just -- and get their side of the story. But I'll give you a
10 chance to speak again. Don't worry. So I'll come back to you.

11 All right. So what's -- what's the other perspective here?

12 MR. BEIK: The other perspective, Your Honor, is
13 essentially that everything that's in Malibu's possession,
14 custody and control has been, in fact, produced.

15 It's important to give some kind of understanding. I think
16 that potentially defendant doesn't understand what IPP does,
17 what information they actually provide. So it might be
18 helpful -- Ms. Pelissier put it in her declaration in support
19 of this response to this motion.

20 But IPP essentially -- you know, Malibu has a contract with
21 IPP. In terms of, you know, the veracity of what IPP does,
22 that's been barring -- that's been challenged, and that's been
23 through the ringer in terms of courts. Courts have brought the
24 folks from Germany over into the district court in New York to
25 go through the entire process and so forth. So this is the

1 first that I'm understanding that that's actually being
2 challenged, that the fact that what IPP does is actually being
3 challenged.

4 But in any event, what IPP does is they essentially go and
5 they have a proprietary software that goes and looks for and
6 detects copyright infringement associated with companies'
7 movies. Malibu was a small customer for IPP. And IPP does
8 this for a lot of movie companies. And they detect this online
9 infringement. And then what they do is they provide that data,
10 which includes essentially an IP address. It includes the
11 movies, the dates and the file hash that was actually detected
12 in order to identify the movies.

13 That information is then provided, in our case, once a
14 month to the client, which in this case Malibu.

15 THE COURT: How is it provided?

16 MR. BEIK: Pardon?

17 THE COURT: How is it provided? Is it emailed? Is
18 it --

19 MR. BEIK: Yes, Your Honor. It is email.

20 And the email that was produced is from June 2019. And to
21 the best of our knowledge that is the email that was sent to
22 Malibu's former general counsel who -- that's a big problem
23 here. That's a gigantic problem here that I'll get to in a
24 moment.

25 But that email, all that comes through is attached as the

1 new data set. And the general counsel takes that data set.
2 And what's in that data set is that -- the IP addresses, the
3 file -- all the information that's listed in Exhibit A and B to
4 the complaint. So essentially everything that IPP had
5 contacted with us has already been produced.

6 They also provide additional evidence, which is -- you
7 know, if you look at Exhibit A to the original complaint, it
8 shows the date of the infringement, the file hash, the movie
9 and so forth. In this case we have nine infringements,
10 starting in 2017, going all the way through until --

11 THE COURT: How do you know that? From this packet
12 that we're talking about?

13 MR. BEIK: Correct.

14 THE COURT: Okay.

15 MR. BEIK: That's the -- that's the data that they
16 provide. Okay. When I say "data," they aren't providing a
17 copy of the hash. They don't provide that. You have to pay
18 extra for that in order to obtain it. And -- but what they are
19 contracted to provide, which we provided the contract that
20 Malibu had with IPP -- is, again, they provide the IP
21 addresses. They provide all the data that forms the basis for
22 the lawsuit, and then corresponding affidavits and then also
23 additional evidence, which is third-party content that was also
24 detected.

25 So like in this case there's over 2,000 others that were

1 also provided by IPP, which has also been produced to
2 defendant. And that's what -- that's what the contract says.
3 IPP is not contracted to do anything else other than that.

4 Now, if we hire them to be -- or if the party wants to hire
5 them to come in and be an expert in the case, well, then that's
6 an additional fee, and that's a whole different -- that's a
7 whole different game. But that wasn't done in this case. And
8 there was -- you know, that's not -- that's not what happened.

9 It was attempted. Obviously, as my client stated in her
10 deposition, she tried to reach out to them, tried to reach out
11 to them, you know. And that was one of our bases to extend the
12 discovery deadline, was because of -- we thought, with the
13 coronavirus, whatever issues had happened with our previous
14 general counsel, then, you know, we were trying to get in touch
15 with them to say, "Look, we need an expert to come in and
16 provide evidence for us."

17 But in any event, let me get -- so that's kind of maybe a
18 misunderstanding of what defendant thinks IPP does and has
19 provided. That's what they provided. And, again, just to
20 reiterate, I've got a transcript from a hearing that took place
21 in D.C. I believe it was already provided in discovery to
22 defendant. But, you know, essentially is where it goes
23 through -- the judges -- I mean, this has been going on a long
24 time. It's not like they would just let this happen for ten
25 years, all courts all across the country -- and not just

1 Malibu. This is, again, many, many companies file BitTorrent
2 lawsuits. This is a huge, huge [inaudible] for movie companies
3 in terms of online infringement.

4 And so this whole -- IPP's entire process and everything
5 was vetted, again, by a federal judge in New York based on
6 whether or not it's appropriate to issue a order granting the
7 third party IP company to provide the name of the -- of the
8 individual in terms of the third party subpoena that's filed at
9 the beginning of the case in order to secure the name of the
10 individual that owns the IP address. But I think I've covered
11 that aspect of it.

12 Let me shift gears, if the Court will let me, to the issue
13 with the former general counsel and I think what has been a
14 huge part of frustration for Malibu and also for defendant in
15 this case. The issues with the former general counsel --
16 obviously, as opposing counsel mentioned earlier, Malibu was in
17 a lawsuit with them whenever their relationship deteriorated.

18 As Ms. Pelissier stated in her deposition and in her
19 declaration, the Lomnitzer law firm was the general counsel.
20 They handled the campaign, is what Malibu calls it, for the
21 piracy of online infringement for the entire country. They
22 almost exclusively -- I mean, she put in her declaration that
23 they were the ones -- Lomnitzer is the one that contact -- that
24 communicated with IPP.

25 Now, having said that, the communications were essentially,

1 "Here's your data for the month," and then there'd be one other
2 email that says, "Here's your affidavits."

3 So the problem with Lomnitzer is, that we requested -- and
4 at the time of that joint advisory we requested Lomnitzer to
5 provide us with all communications with IPP because they're the
6 only ones that have the communications with IPP. And we even
7 sent a external hard drive to Lomnitzer requesting all of this.
8 You know, clearly -- and all that was provided was what we
9 submitted.

10 Now, we do know -- I spoke to one of the paralegals this
11 morning. We do know there is another email related to this
12 case, which would have been those affidavits coming -- the
13 affidavit coming back from Mr. Tobias Fieser. That email, that
14 they clearly didn't include -- and it clearly exists because
15 she told me she'd be willing to provide an affidavit to the
16 Court basically saying that she has no access to that because
17 whenever Lomnitzer essentially, you know, cut everything off,
18 Lomnitzer controlled Smokeball. Lomnitzer controlled all the
19 email addresses for everybody that was communicating with IPP
20 and everybody else throughout the team, also included all the
21 PACER account. She cut out access to us to everything.

22 So, as a result, we had no access to anything and certainly
23 nothing that the -- that the defendant is requesting. And we,
24 in absolute good faith, represented in the joint advisory that
25 we were going to provide the communications that were with IPP.

1 Obviously, defendant has -- as I started with this
2 presentation, there's a different idea as to what IPP was
3 actually providing versus what was actually going to be there.
4 But, again, we didn't receive anything else other than what
5 was -- what was produced.

6 But in a typical case that is exactly what -- you know,
7 everything was already provided. So, essentially, the
8 additional evidence was provided, the list of all the
9 infringing works of a third party, which, again, that was in
10 the contract with IPP. They provide the IP address. They
11 provide the movies that were infringed, the date and time and
12 the file hash that identified it. And they provide the
13 corresponding affidavits, and they provide the additional
14 evidence. All of that was produced except for that second
15 email in this case where the affidavit would have been
16 requested and come back.

17 So, essentially, my client did -- and let me address a
18 little bit of the WhatsApp and Skype issues. My client, when
19 asked in her deposition about WhatsApp and Skype, she used it
20 only through voice. She didn't use it through text message and
21 those types of things. She put that in her declaration in
22 support of the response to this motion.

23 Secondly, she did not communicate with them, as she also
24 put in the declaration. The general counsel did, Lomnitzer law
25 firm. Before Lomnitzer, it was another law firm named Pillar

1 that also was the one that would communicate. They also
2 negotiated with IPP in terms of when IPP wanted more money or
3 if they wanted, you know, anything else. The lawyers all
4 handled that, and she didn't handle that.

5 That's one of the issues that she had with Lomnitzer, was
6 because Lomnitzer agreed to pay IPP more money, and
7 Ms. Pelissier did not agree with that. And so that was also
8 one of the other issues involved with that dispute from
9 association with her former general counsel.

10 And just -- the other -- trying to think of all the other
11 different things. Yeah. In terms of logs, everything was
12 searched. She put in her -- she reviewed text messages, email
13 messages, any other applications, paper files, additional
14 communications between Malibu and IPP, and she didn't locate
15 anything else.

16 So, essentially, you could issue an order saying, you
17 know -- she doesn't have anything else to produce. And it
18 makes sense. And the reason it makes sense is because the
19 Lomnitzer law firm was the one that was communicating with IPP,
20 not Malibu.

21 And, again, we can request it from Lomnitzer. We did
22 request it from Lomnitzer. We repeatedly requested it from
23 Lomnitzer. And all we got was what was produced in this case.

24 I'm trying to think. There was something else I was going
25 to highlight, if the Court doesn't mind.

1 THE COURT: No. That's okay. Take your time.

2 MR. BEIK: Okay. So, essentially, just to highlight
3 again that what they're requesting -- again, defendant didn't
4 send a subpoena to IPP. They could have done that. We
5 requested to extend discovery deadlines. They opposed that.
6 We requested additional time to get an expert witness. They
7 opposed that. You know, again, they've opposed us on every
8 single thing.

9 You know, obviously, the Lomnitzer law firm, the former
10 general counsel has created a very difficult position for
11 Malibu to pursue and develop its case. We already have summary
12 judgment motions on file. Both parties worked hard to get
13 those done. Again, opposing counsel opposed all of our
14 deadlines for extensions.

15 Then they wanted to ask the Court for another extension,
16 and we didn't oppose. We said, "Okay. That's fine."

17 Now, and, again, with regard to that deposition of Doe,
18 opposing counsel tried to act like they were so giving. That
19 deposition was requested. It was noticed months and months and
20 months and months before October 20. And we had an email
21 agreement that basically said, we will reschedule that
22 deposition.

23 Now, I didn't make a big fuss about it at the hearing
24 because we did not -- we lost on the motion for extension of
25 the deadlines and everything else. But, you know, they were

1 offering the defendant for the deposition, you know, basically
2 on affirmative defenses, which one of those affirmative
3 defenses was not infringement. So I viewed it as it covered
4 everything anyway.

5 But it's just important to note that it wasn't like Malibu
6 didn't send a deposition notice, just like they did earlier,
7 but we had to agree on different schedules. And, clearly, we
8 wanted to wait until we, you know, had a chance to get our
9 motion for extension of the discovery deadlines and expert
10 deadlines heard, which it was heard. It was denied on both
11 counts. And then we went forward with the deposition.

12 Now, the only other thing I wanted to mention is that, you
13 know, defendant has a little bit of unclean hands here. Just
14 like they're talking about Malibu not producing stuff,
15 defendant's hard drives, he testified in his deposition that he
16 took those hard drives and he -- and he treated it as a
17 security event. He's never produced them, never produced them.

18 Malibu didn't file a motion to compel. We didn't go and
19 try and fight on it, in part because we didn't have an expert
20 to look at it. But the end of the day is, is that you can't
21 seek equity and then also -- and not do equity. And that's
22 just another -- just something to note, is that it's not like
23 the defendant comes here without, you know, that being an issue
24 as well.

25 THE COURT: Okay. All right. Anything to say in

1 reply, Mr. Morris?

2 MR. MORRIS: I do, Your Honor. I'm not sure where to
3 start. But let's just start with about -- within the four
4 corners of this motion for sanctions. Mr. Beik just said IPP
5 sent the data sets, they sent the affidavits over emails on a
6 monthly basis. We have one. We don't even have the data set
7 from this case. That alone shows that they did not meet their
8 discovery obligations here, despite their representation that
9 they would send those communications. We don't have the other
10 emails with those other data sets.

11 So you have Malibu sitting here saying, "Well, the IP
12 address, the hash values all came from this data set that IPP
13 sent." We don't -- we have no ability to test that because we
14 don't have those communications, and we don't have the attached
15 data sets. That's one reason why we filed this motion for
16 sanctions.

17 Second, Your Honor, if Malibu brought IPP over here to
18 testify in court cases, where's those communications? I mean,
19 there's no emails about -- between Malibu and IPP discussing
20 their testimony? I mean, we know that IPP and -- Mr. Fieser
21 has been used as a testifying expert in other cases. Where are
22 those emails? Where are the draft expert reports? Where's all
23 these things that we would expect?

24 Third, Your Honor, about the contract with IPP, they didn't
25 produce it. They produced a part of it. And we brought this

1 up in our reply. I wrote Mr. Beik. Said, "Hey, where's the
2 whole agreement with IPP?" He responded, "This is all we
3 have." It's missing at least the first page. So there's
4 another issue of spoliation.

5 And then I think you just have these little things showing
6 why Malibu just hasn't conducted themselves well through
7 discovery here. For example, in their -- in their opposition
8 to our sanction motions they say that all communication stopped
9 with IPP in May 2019. But then you have Mr. Beik saying that
10 the email they produced to us was dated June 2019 from IPP.
11 Those two things don't reconcile.

12 You know, and we have one email from the Lomnitzer law firm
13 that just happens to be from this case. Again, it just doesn't
14 make any sense, Your Honor. At the very least, Malibu had
15 custody, control, possession of its documents. Even if they
16 were in Lomnitzer's possession, they were Malibu's. We all
17 know that. If your client asks for documents, you're
18 entitled -- you're obligated to hold onto them.

19 Malibu can't sit here and blame Lomnitzer for Malibu's own
20 inability to safeguard its documents when it's filing thousands
21 of copyright lawsuits, by its own admission, in federal courts.
22 It should have a -- I mean, you would imagine would have a
23 system in place for safeguarding these documents and producing
24 them in discovery. They haven't.

25 So, again, one single email when, on a monthly basis, IPP

1 was sending these data sets and affidavits to Malibu's counsel.
2 At the very least that shows spoliation and shows why sanctions
3 are warranted here.

4 And, finally, I just want to address this unclean hands
5 issue. They requested every hard drive in Doe's possession,
6 access to all his cloud files, access to every video game
7 console in his house in their request for production. So we
8 responded saying, "That's overbroad, but we're willing to meet
9 and confer to try and narrow this." They never took us up on
10 that, and we put this in our opposition to their motion to
11 extend.

12 If they didn't take us up on the -- on the offer to confer
13 about getting those hard drives and narrow those requests for
14 productions, that's not on us. That's on Malibu. So there's
15 no unclean hands here. We're simply seeking -- we've simply
16 been seeking these communications from IPP that Mr. Beik all
17 but said are out there. We haven't gotten them. And that's
18 why sanctions are warranted here, Your Honor.

19 THE COURT: Okay. Well, look -- thank you, Counsel.
20 There's a lot -- a lot's been said. There's a lot of
21 information, a lot of -- a lot of accusations flying back and
22 forth. But at the end of the day, y'all are pretty far down
23 the road here. You had a pretty good run at conducting
24 discovery in this case.

25 Look, the lack of information here is a concern. The lack

1 of communications produced is a concern. But there were --
2 there was a mechanism to address that, that, you know, wasn't
3 pursued. Instead, we've got this motion for sanctions,
4 allegations of spoliation and bad faith. That's a high burden
5 for me. And notwithstanding my not insignificant concern at
6 the lack of information that was produced, I don't think that a
7 sufficient showing's been made here to warrant sanctions,
8 specifically an adverse instruction or money sanctions in this
9 case.

10 So I think this case just needs to -- just needs to get on
11 down the road. There's not a full and complete data set here
12 in terms of discovery, I don't think for anybody in this case,
13 it looks like. But it is what it is. You know, it's
14 significant that a -- that a significant extension to the
15 discovery deadline was sought and was opposed by defendant, but
16 now we're sort of talking about sanctions in connection with,
17 you know, a lack of complete discovery.

18 So the motion's going to be denied on that basis. And I'll
19 just issue a short written order that just basically sums that
20 up. But I wanted to just provide my reasoning here on the
21 call.

22 Anything further, Mr. Morris, that I ought to take up?

23 MR. MORRIS: Not for me, Your Honor.

24 THE COURT: Thank you, sir.

25 Mr. Beik, anything from you?

1 MR. BEIK: No, Your Honor.

2 THE COURT: Okay. All right. I appreciate your
3 thoughtful arguments, counsel. Thank you. We'll be in recess.

4 * * *

5 (3:13 p.m.)

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I, court approved transcriber, certify that the foregoing
is a correct transcript from the electronic sound recording of
the proceedings in the above-entitled matter.

Date: 3/3/2021 /s/ Chris Poage
Approved Transcriber